No. 84-2009

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

DEL MONTE CORPORATION, a New York corporation,
R. J. REYNOLDS INDUSTRIES, INC., a Delaware corporation,
DEL MONTE SNACKS, INC., a California corporation,
Petitioners,

VS.

BARBARA BLAU, RAM BLAU, ANN MAYO and
RICHARD LINDGREN, individually and
on behalf of all other former employees of
DEL MONTE SNACKS, INC., similarly situated,
Respondents.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

INTRODUCTION

Respondents admit that, under the Ninth Circuit's holding, noncompliance with ERISA's reporting and disclosure provisions "is probative of and, in fact, may *in itself* be sufficient to establish arbitrary and capricious conduct" (Respondents' Brief in Opposition to Petition for Writ of Certiorari (hereinafter "Opp."), p. 8) (emphasis added). Hence, contrary to this Court's recent decision in *Massachusetts Mutual Life Insurance Co. v. Russell* (June 27, 1985) 53 U.S.Law Week 4938, ____ U.S. ____, the court below has created a "remedy" not set forth in ERISA, under which an employee may recover "benefits" based solely upon alleged procedural violations unrelated to a plan administrator's reasonable decision to deny benefits. That unprecedented holding, and the Ninth Circuit's novel limitations upon an employer's

discretion in interpreting an ERISA plan, require review by this Court.

ARGUMENT

I

THE NINTH CIRCUIT'S OPINION WOULD PERMIT RECOVERY OF BENEFITS BASED UPON REPORTING AND DISCLOSURE VIOLATIONS UNRELATED TO THOSE BENEFITS.

A. Under the Ninth Circuit's opinion, a violation of ERISA's procedural provisions "may in itself be sufficient to establish arbitrary and capricious conduct."

Respondents make inordinate efforts to characterize the dispute here as simply one about the unique terms of a particular plan (see Opp., pp. 2-3, 10, 11-13, 18-22, 24.) Despite respondents' attempts to downplay the importance of the issues presented, they themselves admit that the "essence" of the Ninth Circuit's ruling is that noncompliance with ERISA's reporting and disclosure provisions "is probative of and, in fact, *may in itself be sufficient to establish arbitrary and capricious conduct*" (Opp., p. 8) (emphasis added). This is a rule of per se liability: if the administrator's noncompliance is sufficiently "flagrant," then the administrator's denial of benefits may be arbitrary and capricious "as a matter of law" regardless of whether the denial of benefits was causally related to the noncompliance (see Appx., pp. A26-A29, A35). That ruling is contrary to previously decided cases, which hold that procedural violations of ERISA may be the basis of a cause of action *if* they cause economic injury through the loss of benefits which otherwise would have been granted (see Petition for Writ of Certiorari (hereinafter "Pet."), p. 7).[1]

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[1] Respondents assert that "numerous cases" have found "arbitrary and capricious" conduct "due to a procedural violation" (Opp., p. 22). The cases cited by respondents (Opp., p. 22, fn. 22; and see id., p. 17, fn. 18) are instructive. One of those cases (*Wolfe v. J.C. Penney Co., Inc.* (7 Cir. 1983) 710 F.2d 388) stressed that the employee was "*not*

Equally important, the ruling below is contrary to this Court's recent decision in *Massachusetts Mutual Life Insurance Co. v. Russell* (June 27, 1985) 53 U.S.Law Week 4938, ____ U.S. ____. In *Russell,* the Court noted Congress' careful delineation of remedies within ERISA and the absence of any provision for extra-contractual damages, declaring, "[w]e are reluctant to 'fine-tune' an enforcement scheme crafted with such evident care as the one in ERISA" (53 U.S.Law Week 4942). This Court held that a claim for extra-contractual—but actual—damages could not be maintained. A fortiori, in this case, the Ninth Circuit's creation of a right to recover "benefits" absent causation and actual economic loss must also be rejected.[2]

The Ninth Circuit's ruling has already led to further conflict between the circuits. The Second Circuit recently considered a claim for severance benefits where there had been noncompliance with ERISA's disclosure and reporting provisions (*Gilbert v.*

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entitled to a substantive remedy * * * based upon [the administrator's] procedure violation" (710 F.2d 393) (emphasis added), citing *Grossmuller v. International Union, U.A.W.* (E.D.Pa. 1981) 511 F.Supp. 709, which held that "[a] substantive remedy * * * would be possible only if plaintiff could show that the procedural defects caused the substantive violation" (511 F.Supp. 711). In four of the cases, it was held that an employee *who suffers an economic harm* due to a procedural violation is entitled to a substantive remedy (*Gors v. Venoy Palmer Market, Inc.* (E.D.Mich., S.D. 1984) 578 F.Supp. 365, 368-369; *Hillis v. Waukesha Title Co., Inc.* (E.D.Wis. 1983) 576 F.Supp. 1103, 1109; *Grossmuller v. Budd Co. Consol Retirement, Etc.* (E.D.Pa. 1982) 547 F.Supp. 111, 115-116; *Toland v. McCarthy* (D.Mass. 1980) 499 F.Supp. 1183, 1194-1195). And in one, although the court concluded that the plan trustees were obligated to provide a written rationale for their decision, it did not even suggest that a cause of action *for damages* would lie for failure to do so (*Richardson v. Cent. States, Southeast & Southwest* (8 Cir. 1981) 645 F.2d 660, 664-665).

[2] The concurring opinion in *Russell* was of the view that extra-contractual damages might be available in some cases if an appropriate analogy to state trust law could be found (53 U.S.Law Week 4945). We are aware of no principle of state trust law which would convert procedural noncompliance into a "substantive" wrong, absent an actual economic loss flowing from the noncompliance.

Burlington Industries, Inc. (2 Cir. 1985) 765 F.2d 320). Stating that it would "adopt" the "approach" of the Ninth Circuit, that court held:

> "The question of whether [the employer's] violations of ERISA's requirements sufficiently taint its denial of severance pay so as to warrant a finding that it was arbitrary and capricious is not before us. That determination is left to the judgment of the district court" (765 F.2d 329).

Thus, the Second Circuit, like the Ninth Circuit, has departed from precedent and determined that procedural violations alone may "taint" an interpretation of a plan and "warrant" an award of "benefits."[3]

B. The decision to deny benefits was fully within the scope of the plan, and respondents suffered no injury.

Respondents seek to bolster the Ninth Circuit's ruling with three other, equally erroneous, arguments: (1) that, "under the express terms of the plan, respondents *are* entitled to benefits," (2) that, "in fact, * * * respondents were harmed," and (3) that the petition "ignores" the "gross nature" of Del Monte's procedural violations of ERISA (Opp., p. 11) (emphasis in original). We respond seriatim:

1. The Del Monte plan's definition of eligibility provides that severance benefits are payable to "employees whose *positions are eliminated as a result of * * * elimination of operations to which*

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[3] In addition to claiming that procedural violations entitle them to "benefits" per se, respondents also cite a few purported instances of "arbitrary and capricious" conduct in the interpretation of the plan. Notably, neither the district court nor the Ninth Circuit agreed with these claims, no doubt because they are without foundation. For example, respondents place great emphasis upon testimony by a plan administrator to the effect that he had not read the written plan prior to acting (see Opp., pp. 8, 14, fn. 15, 16, fn. 17, 23). Respondents fail to advise the Court that he also testified (1) that, prior to acting, he consulted with legal and industrial personnel (ER, pp. 339-340), who *were* fully conversant with the written plan (ER, pp. 121, 124), and (2) that the written plan itself reflected "a long existing policy" which was applied in this case (ER, p. 165).

they have been assigned" (ER, p. 238) (emphasis added). Respondents acknowledge that their interpretation argument hinges on "the key conjunctive phrase" (Opp., p. 20) which, after the definition of eligibility, continues: "*and* for whom appropriate alternative employment opportunities are unavailable within the Corporation" (ER, p. 238) (emphasis added). That phrase clearly states an *additional condition* for qualification for benefits, which condition on its face is dependent upon elimination of employees' positions. If that *first* condition of eligibility is not met (i.e., the positions are not eliminated), then one does not reach the question of the occurrence of the *second* condition (i.e., the unavailability of other positions within the corporation).[4]

Thus, the prepositional phrase "within the Corporation" modifies the condition stated in respondents' "key" conjunctive phrase (i.e., the unavailability of alternative employment), not the preceding condition of eligibility (i.e., position elimination)—which condition notably contains no such modifier.

2. Respondents emphasize the Ninth Circuit's reference to the occurrence of "substantive harm" (Opp., pp. 9, 16) but, like the Ninth Circuit, they are unable to explain what that "harm" is. Obviously, any claim that respondents "suffered harm" by not receiving severance benefits (see Opp., p. 9) would be bootstrapping; the denial of benefits resulted from interpretation of the plan, not noncompliance with reporting or disclosure provisions of ERISA. And respondents do not appear to advance such an argument seriously.

Rather, respondents' major argument on this point is a variant of estoppel. Claiming that they had "knowledge of Del Monte's uniform practice," respondents assert that they were "misled into believing" that they would receive severance benefits and were thereby induced to remain at Granny Goose "rather than seek other employment" (see Opp., pp. 15, 16, 7). This argument fails both factually and legally. Respondents knew that other subsidiaries had been sold as ongoing businesses, and respondents did not know of a single employee who received severance benefits in

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[4] The same is true of the other "exclusions" and "exceptions" mentioned by respondents (see Opp., pp. 6, 12).

such cases (ER, pp. 136, 229, 448, 469, 610, 611). Moreover, there is not one iota of evidence that respondents declined other employment, let alone that such employment would have been on more favorable terms. Thus, respondents failed to show either reliance or detriment, and they therefore can claim no injury. "Since evidence of such reliance would be within their control, their failure to assert it, if indeed it exists, is fatal. In the absence of detrimental reliance, there is no reason to estop the defendants from denying coverage" (*Petrella v. NL Industries, Inc.* (D.N.J. 1982) 529 F. Supp. 1357, 1371).[5]

3. Respondents do not, and cannot, explain how their claim of "gross violations" of ERISA supports the decision below. There simply is no evidence that any noncompliance with ERISA was related to, or brought about, the interpretation complained of here. Respondents', and the Ninth Circuit's, colorful rhetoric is no substitute for reasoned legal analysis.

II

THE NINTH CIRCUIT'S DECISION IS IN CONFLICT WITH THE *SLY* AND *ANDERSON* DECISIONS.

Try as they may, respondents cannot distinguish the decision in *Sly v. P. R. Mallory Co., Inc.* (7 Cir. 1983) 712 F.2d 1209. They admit that the severance plan in *Sly* was dependent upon "position elimination" (Opp., p. 20), and, as discussed in the Petition (at p. 11) and immediately above, the Del Monte plan is similarly dependent upon position elimination *generally*; it does *not* depend (as respondents would have it) upon a "loss of position at *Del Monte*" (Opp., p. 21) (emphasis by respondents). Hence, the

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[5] Nor is there any basis for the suggestion that failure to recognize respondents' novel claims would somehow "deny" employees a remedy for an employer's noncompliance with ERISA's reporting and disclosure provisions or would somehow "reward" such noncompliance (see Opp., p. 2-3, 10, 25; and see Appx., p. A32). As discussed above, Congress carefully set forth in ERISA the remedies available to employees. Those remedies include injunctive relief to force compliance (29 U.S.C. § 1132 (a)(5)), as well as other civil and criminal penalties for ERISA violations (see 18 U.S.C. § 1027; 29 U.S.C. §§ 1131, 1132).

holding of the Seventh Circuit applies here; namely, that it was entirely reasonable—and not arbitrary and capricious—to conclude that, although positions were eliminated with the employer, "in fact the work force remained intact and the positions remained available to the employees" (712 F.2d 1211). Thus, severance plans which contain indistinguishable pertinent language face differing results in the Seventh and Ninth Circuits.

Respondents miss the point of petitioners' discussion (at Pet., pp. 7-8) of *Anderson v. Ciba-Geigy Corp.* (11 Cir. 1985) 759 F.2d 1518 (see Opp., pp. 19-20). In *Anderson*, in a context similar to the instant case, the Eleventh Circuit soundly rejected a claim that procedural violations rendered the arbitrary and capricious test inapplicable, and it applied that test in a manner consistent with prior decisions (759 F.2d 1521-1523). In contrast, the Ninth Circuit, while purporting to act within the arbitrary and capricious test, created the novel rule that procedural violations may render plan interpretations arbitrary and capricious per se. That conflict is irreconcilable, and requires resolution by this Court.

III

THE NINTH CIRCUIT'S APPLICATION OF THE ARBITRARY AND CAPRICIOUS TEST IS IN CONFLICT WITH DECISIONS IN OTHER CIRCUITS.

In attempting to defend the Ninth Circuit's application of the arbitrary and capricious test, respondents contend, first, that the Ninth Circuit really meant to say only that conditions contrary to a plan's language may not be imposed and, second, that, in any event, what the Ninth Circuit actually did say was correct (see Opp., pp. 21-25). Respondents are wrong on both counts.

The Ninth Circuit was clear in its ruling that a plan administrator's interpretation is arbitrary and capricious when it "impose[s] * * * standards not required by the severance policy" (Appx., p. A29). If an administrator *may not* impose "standards" which are "not required" by a plan, then it *must* apply only those "standards" which are required by that plan. This is no different than saying that an administrator's interpretation is impermissible, i.e.,

arbitrary and capricious, unless it is required by the language of the plan. In the context of a plan which admits of but *one* interpretation, such a broadly-stated rule would not cause an objectionable result. However, in the context of a plan which is subject to alternative reasonable constructions, such a rule is contrary to the law prevailing in the majority of the circuits (see Pet., pp. 10-12).

In this regard, respondents also assert that the rule stated by the Ninth Circuit is correct, relying upon an Eighth Circuit case and a few other cases which cite that Eighth Circuit case (see Opp., pp. 23-24). But, as respondents admit, the premise of those cases is that a condition of eligibility has been imposed "without any foundation in the language of the plan" (Opp., p. 24). This supposed rule simply can have no application when the "condition" in fact is a reasonable interpretation of the plan.[6]

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[6] For similar reasons, there is no relevance to the cases cited by respondents in support of their claim that Del Monte's consistent past practice is irrelevant (see Opp., p. 25, fn. 25). None involved the situation in which the past practice was in fact consistent with the language of the plan. Rather, those cases involved situations in which there was (1) an unreasonable interpretation of a plan (*Morgan v. Mullins* (8 Cir. 1981) 643 F.2d 1320, 1324), (2) a consistent past practice *contrary* to the language of the plan (*Petrella v. NL Industries*, Inc. (D.N.J. 1982) 529 F.Supp. 1357, 1362), (3) a condition imposed not within the language of the plan (*Palino v. Casey* (1 Cir. 1981) 664 F.2d 854, 859 (dictum); *Valle v. Joint Plumbing Industry Bd.* (2 Cir. 1980) 623 F.2d 196, 202-204), or (4) a forfeiture clause violated by an employee who was unaware of it (*Hillis v. Waukesha Title Co., Inc.* (E.D.Wis. 1983) 576 F.Supp. 1103, 1108-1110).

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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